LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-693

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners

v.

COUNTY OF BUCKS, *et al.*

and

ALL OF THE MUNICIPALITIES OF BUCKS COUNTY,
Respondents

BRIEF FOR RESPONDENTS

Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

STEPHEN B. HARRIS
HARRIS AND HARRIS
Attorney for Respondents
(Individually named in Appendix "B" herein)

Box 160
Warrington, Pennsylvania 18976

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

TABLE OF CONTENTS

	Page
Counter-Statement of the Case	1
Reasons for Denying the Writ	3
The state court's decision dismissing the petitioner's complaint in equity rests on independent state grounds, and therefore, there is no federal question presented to your Court for decision.	3
A. The complaint was dismissed because the petitioner's failure to follow the exclusive procedure to challenge the constitutionality of a zoning ordinance.	4
B. The complaint was dismissed because it was premature.	6
C. The complaint was dismissed because the affirmative relief is not available and presents a non-justiciable controversy.	9
Appendix "A"	13
Appendix "B"	14

TABLE OF CITATIONS

Cases:	Page
Atlantic Coastline Railroad Company v. Mims, 242 U.S. 532 (1917)	4
Baker v. Carr, 369 U.S. 186 (1962)	9
Bliss Excavating Company v. Luzerne County, 418 Pa. 446 (1965)	5, 7
Commonwealth of Massachusetts v. Melon, 262 U.S. 447 (1923)	8
Doremus v. Board of Education, 342 U.S. 429 (1952)	8

TABLE OF CITATIONS—*(Continued)*

Cases: Page

Farson, Son & Company v. Bird, 248 U.S. 268 (1919) 6

Fay v. Noia, 372 U.S. 391 (1963) 4

Flast v. Cohen, 392 U.S. 83 (1968) 9

Hartford Life Insurance Company v. Johnson, 249 U.S. 490 (1919) 4

Herb v. Pitcairn, 324 U.S. 117 ..... 3, 6

Home Life Insurance Company v. Board of Adjustment, 393 Pa. 447 (1958) 7

Jacobs v. Fetzer, 381 Pa. 262 (1955) 5

John v. Paullin, 231 U.S. 583 (1913) 4

Knup v. Philadelphia, 386 Pa. 350 (1956) 5, 7

Louisville and Nashville Railroad Company v. Woodford, 234 U.S. 46 (1914) 4

McQuade v. Trenton, 172 U.S. 636 (1899) 6

Melon Company v. McCafferty, 239 U.S. 134 (1915) .. 6

National Land and Investment Company v. Easttown Township Board of Adjustment, 419 Pa. 504 (1965) 9

Rescue Army v. Municipal Court, 331 U.S. 549 (1947). 11

Roeder v. Hatfield Borough Council, 439 Pa. 241 (1970) 7

Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) 10, 11

Taylor v. Moore, 303 Pa. 469 (1931) 5

Unger v. Township of Hampton, 437 Pa. 399 (1970) .. 5

Statutes:

28 U.S.C. 1257 (3) 3

TABLE OF CITATIONS—*(Continued)*

Statutes:	Page
Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, §13, 46 P. S. §156	5
Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P. L. — 247 53 P. S. §10101 et seq.	1, 2
Miscellaneous:	
Note— *"Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decision of Federal Questions"*, 61 Columbia L. Rev. 255 (1961)	4

COUNTER-STATEMENT OF THE CASE

The instant action was begun by a complaint in equity which requested both injunctive and affirmative relief. "The gravamen of the action is that the zoning ordinances of the fifty-four local municipalities of Bucks County were all said to be unconstitutional and invalid in that they are contended to exclude low and moderate income housing throughout the County." [Opinion of the Honorable Edwin H. Satterthwaite, Judge of the Court of Common Pleas of Bucks County, Petitioner's Appendix "C", A7] The injunctive relief requests that the zoning ordinances of all municipalities within Bucks County be declared null and void. The affirmative relief requests the court to supervise the reformation of the zoning ordinances of all the municipalities of Bucks County to provide, on a county-wide basis, a plan for low and moderate income housing.

In addition to the classes of plaintiffs mentioned in the petitioner's statement of the case, there is an additional class of plaintiffs that is represented by two non-profit organizations, on their own behalf and on behalf of approximately fifty other similarly situated organizations that desire to build low and moderate income housing in Bucks County (Respondent's Appendix "A").

The complaint was not denied by the trial court for the lack of standing of the plaintiffs. The question of standing was not reached by the court, rather the court sustained the preliminary objections of the plaintiff in the nature of a demurrer (a Pennsylvania procedure in which an adverse party may raise preliminarily the question of whether the plaintiff has stated a cause of action upon which relief may be granted—the court in the instant case, determining that the plaintiffs did not). The first reason cited by the court was that the suit was premature and requested an advisory opinion on a hypothetical set of facts. Secondly, the court held that a complaint in equity did not lie as there is an adequate and exclusive remedy at law, pursuant to the Pennsylvania Municipalities Planning Code, Act of July 31,

1968, P.L. —, No. 247 (hereinafter referred to as MPC) 53 Purdon's Statutes Annotated (hereinafter referred to as P.S. §10101 *et seq.*). Thirdly, that the court did not have the power to grant the affirmative relief requested. And, finally, the relief requested was non-justiciable, because it involved a political question and there was a lack of judically discoverable and manageable standards for resolving the question.

REASONS FOR DENYING THE WRIT

The state court's decision dismissing the petitioner's complaint in equity rests on adequate independent state grounds, and therefore, there is no federal question presented to your Court for decision.

The United States Supreme Court is permitted to review decisions of the highest court of a state:

> "By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States." 28 U.S.C. 1257(3).

There must have been a federal question presented to and decided by the state court in order for a Writ of Certiorari to lie.

The United States Supreme Court, from the time of its foundation, has adhered to the principle that it will not review judgments of a state court which rest upon adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117. As the court there observed:

> "The reason is so obvious that it rarely has been thought to warrant statement. It is found in the partitioning power between the state and federal jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion." Id. at p. 119.

The "adequate state ground" rule applies to procedural as well as substantive state grounds. See Note—*"Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decision of Federal Questions"*, 61 Columbia L. Rev. 255 (1961).

The Court, as early as 1914, held that in order to raise a federal question which the Court would review, the federal right had to be asserted according to the proper state procedures. *Louisville and Nashville Railroad Company v. Woodford*, 234 U.S. 46 (1914); *Atlantic Coastline Railroad Company v. Mims*, 242 U.S. 532 (1917); *Hartford Life Insurance Company v. Johnson*, 249 U.S. 490 (1919). There can be little doubt that it rests with each state to prescribe the jurisdiction of its courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy then when the case turns entirely upon questions of local or general law. *John v. Paullin*, 231 U.S. 583 (1913); *Fay v. Noia*, 372 U.S. 391 (1963).

The Supreme Court of Pennsylvania dismissed the petitioner's petition for allowance of appeal to that court, *per curiam*. The Commonwealth Court of Pennsylvania, the intermediate appellate court that heard the instant case, affirmed it *per curiam*, on the basis of the opinion of Honorable Edwin H. Satterthwaite, President Judge of the Court of Common Pleas of Bucks County. Therefore, with the above general principles in mind, we will review the decision of Judge Satterthwaite, contending that he decided the case on an adequate state ground and that, therefore, no federal question is involved and the petition should be denied.

A. The complaint was dismissed because the petitioners failed to follow the exclusive procedure to challenge the constitutionality of a zoning ordinance.

The petitioner brought an action in equity seeking to declare the zoning ordinances of the fifty-four municipali-

ties of Bucks County unconstitutional. The Act of March 21, 1806, P.L. 558, 4 Sm. L. 326, §13, 46 P.S. §156 provides:

> "*Acts of Assembly to be Strictly Pursued.* In all cases where a remedy is provided, or a duty enjoined, or anything directed to be done by any act or acts of assembly of this Commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

MPC provides an administrative procedure to review the constitutionality of a zoning ordinance by any person aggrieved by the ordinance. It also provides for an appeal to the courts from the administrative decision. The Supreme Court of Pennsylvania has uniformly held that the MPC provides an adequate remedy to determine all challenges to the constitutionality of a zoning ordinance. E.g. *Unger v. Township of Hampton*, 437 Pa. 399 (1970). The court in *Unger* also concluded that because the procedure under the MPC is adequate, it is the exclusive remedy to challenge the validity of zoning ordinances. As Judge Satterthwaite stated in his opinion sustaining the respondents' preliminary objections:

> "It is almost hornbook law [in Pennsylvania] that the statutory remedies and the methods of procedure to raise questions of interpretation, application and validity of zoning ordinances are exclusive and must be strictly pursued. Ever since *Taylor v. Moore*, 303 Pa. 469 (1931), the rule has been followed that all questions involving zoning problems must be resolved in the zoning forum and not through other theoretically applicable forms of action, such as an action in equity, as here, to enjoin the enforcement of allegedly invalid ordinance provisions: *Jacobs v. Fetzer*, 381 Pa. 262 (1955); *Knup v. Philadelphia*, 386 Pa. 350 (1956) *Bliss Excavating Company v. Luzerne County*, 418 Pa. 446 (1965)." (Petitioner's Appendix "C", A9)

The case is similar to *Melon Company v. McCafferty*, 239 U.S. 134 (1915), where the decision of the state court was found to have rested on an independent ground broad enough to sustain it wholly irrespective of the federal rights asserted under the due process and equal protection clauses of the Fourteenth Amendment and your Honorable Court concluded it lacked jurisdiction. The state court in *Melon* had held that the bill stated no relief in equity because it failed to allege that resort had been had to adequate administrative remedies provided by state law for challenging tax assessments. The court also remarked that the duty to resort to the adequate remedies provided could not be escaped by assuming that if the remedies had been resorted to, the wrong complained of would not have been rectified. Similarly, in the instant case, the court has ruled that no complaint in equity will lie where there is an adequate remedy at law, and therefore, the petition should also be dismissed for lack of jurisdiction. *See also, McQuade v. Trenton*, 172 U.S. 636 (1899) (adequate state ground—dismissal of request for injunction where petitioner had mistaken his remedy and had failed to resort to proper proceeding against the city for damages); *Farson, Son & Company v. Bird*, 248 U.S. 268 (1919) (adequate state ground—dismissal of request for mandamus because mandamus is not available against the particular officer against whom suit was brought, but rather lay against the County Board of Revenue); *Herb v. Pitcairn, supra* (adequate state ground—complaint properly dismissed where, under state jurisdiction and venue laws, a city court, in which a Federal Employers Liability Act action was commenced, lacked jurisdiction even to transfer the case to a county court which did have jurisdiction).

B. The complaint was dismissed because it was premature.

As an additional ground for dismissal, the trial court also concluded that the instant law suit was not ripe for

decision and merely sought an advisory opinion on the constitutionality of the zoning ordinances of the municipalities of Bucks County. The complaint failed to allege that any petitioner had applied to any respondent for a zoning change, building permit, variance or special exception. The complaint also failed to allege that any petitioner owns land or has an interest in land within any respondent or that any petitioner desires to develop land in any municipality, in a manner that is prohibited by a zoning ordinance. The complaint also failed to aver that any petitioner had been prevented from developing any real estate for low or moderate income housing by any respondent.

The complaint merely alleges the desire to have low and moderate income housing at some point in the future somewhere within Bucks County. Thus, the petitioners seek to litigate the constitutionality of municipal zoning ordinances without any assurance that if the ordinances are declared unconstitutional, that any one will build low and moderate income housing at any time now or in the future at any location within Bucks County.

The courts in Pennsylvania have uniformly held that:

> A Court will take jurisdiction only in a case in which a challenged statute, ordinance, or rule of Court has actually been applied to a litigant; it does not undertake to decide academically the unconstitutionality or other alleged invalidity of legislation until it is brought into operation so as to impinge upon the rights of some person or persons. *Knup v. Philadelphia, supra* at 353.

The Supreme Court of Pennsylvania has reached the same conclusion in many other cases. E.g. *Bliss Excavating Company v. Luzerne County, supra; Home Life Insurance Company v. Board of Adjustment*, 393 Pa. 447 (1958); *Roeder v. Hatfield Borough Council*, 439 Pa. 241 (1970).

The policy of the Pennsylvania courts not to decide hypothetical questions, is identical to the policy of the United States Supreme Court which has been stated as follows:

> The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement and not merely that he suffers in some indefinite way in common with people generally. *Commonwealth of Massachusetts v. Melon*, 262 U.S. 447, 448 (1923); *cf. Doremus v. Board of Education*, 342 U.S. 429 (1952)

The Pennsylvania court did not conclude that the petitioners did not have standing; they simply did not reach the question in concluding that the case was not ripe for decision. The issue of ripeness is not synonymous with the issue of standing. Petitioners assert that ripeness for the future resident of a low and moderate income housing project can only mean that he is presently living in adequate housing and desires better housing and can establish the unconstitutional governmental activities which have denied him housing. The argument is fallacious. The zoning ordinances cannot have denied appellants housing since to date, no one has attempted to build a low and moderate income housing project and been denied. Furthermore, even if the petitioners were successful in this law suit, there is no guarantee that at any time in the future would low and moderate income housing be built in Bucks County. Even after a successful result, the petitioners will remain in exactly the same situation as they are now; awaiting someone who wishes to build this type of housing.

Furthermore, petitioner fails to mention that one class of petitioners are non-profit organizations that are "ready, willing, qualified and able to build [low and moderate income housing] in Bucks County". These petitioners may easily litigate the issue of the constitutionality of any given municipal zoning ordinance by filing a request for change of zoning or apply for a building permit or apply for a variance or special exception. If they apply and are denied, they obviously will have standing; the suit will be ripe for determination and the MPC will be available as adequate remedy

at law to challenge the constitutionality of the ordinance in question.

Just as the courts of Pennsylvania refused to decide the questions presented because they were premature, your Honorable Court should dismiss the petition as "It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack 'a personal stake in the outcome of controversy' ". *Baker v. Carr*, 369 U.S. 186 (1962); *Flast v. Cohen*, 392 U.S. 83,101 (1968).

C. *The complaint was dismissed because the affirmative relief is not available and presents a non-justiciable controversy.*

In addition to the foregoing reasons for dismissing the petitioner's complaint in equity, Judge Satterthwaite also found that with respect to the affirmative requests for relief, the court did not have the power to order the relief. Rather than a detailed discussion of the various statutes involved, the Court is referred to Judge Satterthwaite's opinion in petitioner's Appendix "C" A13-A15, and also, that the relief sought was non-justiciable in that the court would be injected into a political controversy acting as a super legislative body which it will not do.

The Supreme Court of Pennsylvania has held that courts will not undertake to reform zoning ordinances as this is a legislative function. The court held in *National Land and Investment Company v. Easttown Township Board of Adjustment*, 419 Pa. 504 (1965):

> "In the span of years since 1926 when zoning received its judicial blessing, the art and science of land planning has grown increasingly complex and sophisticated. The days are fast disappearing when the judiciary can look at its zoning ordinance and with nearly as much confidence as a professional expert, decide upon the merits of a zoning plan and its contribution to the health, safety and morals for general

> welfare of the community. This Court has become increasingly aware that it is neither a super Board of Adjustment nor a Planning Commission of last resort . . . instead the Court acts as a judicial overseer drawing the limits beyond which the local regulations may not go, but loathing to interfere with those limits, with the discretion of the local governing boards . . . the zoning power is one of the tools of government which, in order to be effective, must not be subjected to judicial interference unless clearly necessary." 419 Pa. at 521.

As the complaint requests the court to supervise the reformation of all of the zoning ordinances of the municipalities of Bucks County, it requests the court to participate in the legislative process and interfere with municipal discretion and is, therefore, non-justiciable.

Furthermore, the request for affirmative relief presents no clear-cut constitutional issues. President Judge Bowman of the Commonwealth Court of Pennsylvania described the complaint in his concurring opinion affirming Judge Satterthwaite's opinion, as follows:

> "A multi-class action in equity seeking unprecedented judicial interference in an arrogation over planning and zoning affairs of every local government in Bucks County, the County itself and their related Boards and Commissions in performance of their powers and duties as conferred and imposed upon them by the legislative branch of the government of this Commonwealth impels judicial restraint in cases such as this where the justiciable issue, while postulated upon alleged violations of constitutional rights, is but a symbolic narrative of conjecture, supposition and abstraction as supportive of the alleged cause of action." (Petitioner's Appendix "B", A2).

Thus, the instant case is similar to *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), in which the Socialist Labor Party brought suit against the election laws of Ohio alleging

denial of equal protection for restricting access of minority parties to the polls. Prior to the issue being submitted to the Supreme Court, a new law was passed rendering a majority of the issues moot. However, presented to your Honorable Court for its determination was the decision of the district court holding that an oath required of candidates in Ohio, was unconstitutional. There was no suggestion in the complaint that the *Socialist Labor Party* had ever refused in the past or will now refuse or will refuse in the future to sign the required oath. There is no allegation of injury that the party had suffered or will suffer because of the existence of the oath. In short, that case parallels the instant case in that the petitioners have not alleged that they have suffered an actual injury from the operation of the zoning laws of any respondent or that they will in the future. The court in dismissing the appeal held as follows:

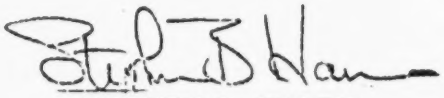
> The long and short of the matter is that we know very little more about the operation of the Ohio affidavit procedure as a result of this law suit than we would if a prospective plaintiff who had never set foot in Ohio had simply picked this section of the Ohio election laws out of the statute books and filed a Complaint in the district court setting forth the allegedly offending provisions and requesting an injunction against their enforcement. These plaintiffs may well meet the technical requirement of standing, and they may be parties to a case or controversy, but the case is not given any particularity to the effect on them of Ohio's affidavit requirement.
>
> This Court has recognized in the past that when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. Id. at 574.

The instant case does not tender any of the underlying constitutional issues in a clean-cut and concrete form. The problems of prematurity and the request for an abstract decision do not present a federal question which your Court should undertake to decide. Consequently the Petition for Certiorari should be denied.

CONCLUSION

Respondents respectfully request that your Honorable Court enter an order denying the Petition or Writ for Certiorari to the Supreme Court of the United States of Pennsylvania because adequate state grounds exist for the decision of the courts of Pennsylvania dismissing the petitioner's complaint and, therefore, no federal question is presented.

Respectfully submitted,



STEPHEN B. HARRIS
Attorney for Respondents

APPENDIX "A"

EXCERPTS OF COMPLAINT

* * * *

5. Plaintiff Bucks County Interfaith Housing Corporation is a non-profit housing development corporation having its principal office at 32 North Broad Street, Doylestown, Bucks County, Pennsylvania, incorporated under the laws of the Commonwealth for the purpose of sponsoring, developing, and building low-income and moderate-income housing, and said Plaintiff is ready, willing, qualified and able to build such housing in Bucks County, but is unable to do so for the reasons set forth hereinafter.

6. Plaintiff Suburban Action Institute is a nonprofit charitable trust organized under the laws of the State of New York, having its principal office at 180 West Post Road, White Plains, New York, which, with its subsidiary nonprofit development corporations, sponsors, develops and builds low-income and moderate-income housing, and said Plaintiff is ready, willing, qualified and able to build such housing in Bucks County, but is unable to do so for the reasons set forth hereinafter.

133. Plaintiff Corporations are ready, willing and able to construct low-income and moderate-income housing in the County and would proceed to purchase and develop sites suitable for such purposes if the discriminatory aspects of the present practices and procedures of the Defendants were eliminated, and unless there is jurisdiction in equity, a multiplicity of suits will have to be filed in the future for the causes of action set forth herein and for each and every project in each municipality.

APPENDIX "B"

The following municipalities join in this brief in opposition to the Writ of Certiorari to the Supreme Court of Pennsylvania:

Bedminster Township
Bensalem Township
Bridgetown Township
Bristol Township
Buckingham Township
Bucks County Commissioners
Bucks County Planning Commission
Chalfont Borough
County of Bucks
Doylestown Borough
Doylestown Township
Dublin Borough
Durham Township
East Rockhill Township
Falls Township
Haycock Township
Hilltown Township
Hulmeville Borough
Ivyland Borough
Langhorne Borough
Lower Southampton Township
Middletown Township
Milford Township
Morrisville Borough
New Britain Borough
New Britain Township
New Hope Borough
Newtown Borough
Newtown Township
Nockamixon Township
Northampton Township
Penndel Borough
Perkasie Borough
Plumstead Township
Quakertown Borough
Richland Township
Richlandtown Borough
Riegelsville Borough
Sellersville Borough
Silverdale Borough
Solebury Township
Springfield Township
Telford Borough
Tinicum Township
Traumbauersville Borough
Upper Makefield Township
Upper Southampton Township
Warminster Township
Warrington Township
Warwick Township
West Rockhill Township
Wrightstown Township
Yardley Borough